REPUBLIC OF KENYA

INTHE HIGH COURT OF KENYA AT MERU

CRIMINAL APPEAL NO. 246 OF 2009

STEPHEN MWIRIGI..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against both the conviction and sentence in Criminal case No. 1133 of 2009 at Meru Law Court-before R. N. Kimingi CM)

JUDGMENT

The appellant Stephen Mwirigi was charged with an offence of defilement contrary to Section 8 (2) of the sexual offences Act No. 3 of 2006.

The particulars of the charge are that on the 13th day of June 2006 at [Particulars withheld] location in Meru Central district within Eastern Province the appellant defiled J M a girl aged 8 years an act which caused penetration to her genitals. The appellant also faced an alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence are that on 13th day of June 2006 at [Particulars withheld] location Meru Central district within Eastern Province, unlawfully and intentionally committed an indecent act by touching the vagina of J M a girl aged 8 years.

The appellant was convicted of the main count and the alternative count and sentenced to life imprisonment in each of the two counts and sentence ordered to run concurrently.

The appellant being aggrieved by both conviction and sentenced filed this appeal setting out seven (7) grounds of appeal being as follows:-

1. ***That trial magistrate erred in law and in fact by convicting the Appellant on insufficient and unsafe evidence.***

2. ***The trial magistrate erred in law and in fact by convicting the Appellant when the complainant's evidence and her witness was contradictory.***

3. ***The trial magistrate erred in law and in fact by refusing to consider the defence case.***

4. ***The trial magistrate erred in law and in fact by convicting the appellant on defective charges.***

5. ***That the trial magistrate erred in law and in fact by convicting the appellant when the medical***

evidence did not support the charges.

6. ***That the whole sentence and conviction was against the weight of evidence.***
7. ***The sentence imposed was harsh and excessive in the circumstances.***

The appellant was represented by Mrs. Kaume, learnt advocate who made the following submissions. Mrs. Kaume started her submissions by consolidating all the grounds of appeal and argued them together. She submitted that the appellant was charged with two counts. Mrs. Kaume urged that the charge sheet indicated the complainant was aged 8 years, whereas the evidence revealed otherwise. The evidence revealed that the girl was aged 10 years and not 8 years, when she was sexually assaulted. Mrs. Kaume further submitted when PW4 produced complainant's baptism card and immunization card it revealed that the girl was 10 years. She argued that the discrepancies were not explained. She further submitted that the charge against the appellant is serious and there should be no loopholes. She submitted due to variance of the years the charge was defective and that the witness was not honest.

On medical evidence Mrs. Kaume argued that PW1 did not produce the initial treatment card and that the P3 form on page 2 has no entries. On page 3 of the P3 form Mrs. Kaume submitted that it is clear there were no injuries to labia and the vagina. She further submitted their was no perforation of the hymen and that there was no discharge noted. On page 4 of the P3 form Mrs. Kaume submitted that is a page for male accused of any sexual offence but not for female complainant. She further urged No.6 is not relevant. Mrs. Kaume urged that PW4 evidence should not have been accepted has no basis had been laid for failure to call the maker of the document, that is the P3 form who was at Chuka area and who could have been called to produce the P3 form. She submitted PW5 gave evidence that was contradictory to the P3 form.

On the appellant's defence Mrs. Kaume submitted no reasons were given for rejecting the appellants defence in its entirety. She submitted the rejection of the appellant's defence was a breach of the appellant's fundamentals rights. Mrs. Kaume submitted that as such the appellant did not have fair trial. She submitted the appellant called two witnesses who were consistent with his evidence. She further submitted that there was no establishment that there was on attempt to arrest the appellant and that he ran away. She submitted the appellant was arrested after 3 years from the date of the alleged offence.

Mrs. kaume challenged the sentence on the ground that the prevailing sentence at the time of commission of the offence was under the penal code as the offence had been committed before the Sexual Offences Act came into force. The sexual offences Act came into force on 21st June 2006 whereas the offence had been commited on 13th June 2006. Mrs. Kaume submitted the sentence by then was upto life imprisonment but it was not mandatory. She further submitted one cannot be convicted on the main charge and the alternative count at the same time.

She further submitted by 13th June 2006 under section 145 of the penal code alternative charge or what the trial court referred to as count II did not exist. She concluded by urging the court to allow the appeal as the evidence did not support the conviction.

The appeal was vigorously opposed by Mr. J. Motende learned state counsel arguing that there was sufficient evidence to support the conviction. He urged that all ingredients of the offence were satisfied. He urged the essential in such an offfence are that of penetration which was proved. He submitted that the complainant gave details of how the appellant grabbed her and defiled her on the ground many times.

The complainant after the incident informed her grandmother who informed the police. Mr. Motende submitted that the offence took place at 6.00pm when the complainant was able to see and identify the appellant. He submitted the complainant knew the appellant. On P3 form Mr. Motende submitted that the same was filled and signed. He submitted that the P3 form on page 3 shows that the hymen was broken and that no discharge was noted on page 4 of the P3 form. Mr. Motende submitted that under No. 5 and 6 deals with specimens or smear collected in examination of 2, 3, and 4 of section C including pubic hairs and vaginal hairs hence it applies to female complainant.

He submitted P3 form supports evidence of PW5 in that No. 6 clearly shows that there was penetration.

On PW5 giving evidence on behalf of the maker of P3 form Mr. Motende submitted that the prosecution complied with the Provision under section 33 and 77 of the Evidence Act.

On treatment notes Mr. Motende submitted that there is no law that requires that treatment notes must be produced to prove there was penetration. Mr. Motende conceded that it was wrong for the court to have convicted the appellant on the alternative count, he however states that sentence was proper and based on the proper law. He also submitted the age of the complaint whether 8 or 10 years is not fatal to the prosecution case. He further submitted that the complainant in cross examination confirmed her age. Mr. Motende supported the conviction and sentence in count 1 only and stated sentence on count II should have been suspended.

On the appellants defence he submitted that there was no evidence of the appellant having been framed. He submitted the date that the appellant allegedly left for Nanyuki has not been disclosed and delay of his arrest and arraignment in court was caused by his having undergone underground.

Under first schedule under transitional Provision under Sexual offences Act it is provided:-

> ***1. Notwithstanding the provisions of any other Act, the Provisions of this Act shall apply with necessary modifications upon the commencement of this Act to all sexual offences.***
>
> ***2. For greater certainty, the provisions of this Act shall supersede any existing provisions of any other law with respect to sexual offences.***
>
> ***3. Any proceedings commenced under any written law or part thereof repealed by this Act shall continue to their logical conclusion under those written laws.***

The appellant was charged with an offence under section 8 (1) of as read with section 8 (2) of sexual offences Act No. 3 of 2006.

Section 8(2) of the Sexual offences Act provides:-

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The charge sheet indicates that the complainant at the time of her defilement was aged 8 years. PW1 gave her age as 10 years as of her time of the defilement. PW2 gave PW1's age as of 2009 as 13 years meaning as of 2006 she was 10 years. PW5 gave complainants age at time of defilement as 8 years. PW4 produced complainants immunization card and baptism card as exhibit 5 and 6 which shows the girl's age as 10 years. The prosecution evidence clearly points out that the complainant at the time of defilement was 10 years and not 8 years as indicated in the charge sheet.

The question is do the variance in the years in the charge sheet and that of evidence make the charge defective. Under Section 8 (1) of the sexual offences Act a person who commits an offence of defilement with a child aged eleven years and less upon conviction shall be sentenced to imprisonment for life. The age for consideration on the charge brought under section 8 (1) and 8 (2) is for any age upto 11 years. The fact that the charge stated 8 years and not 10 years do not make the charge defective as the complainant’s age is within the age bracket covered by the section under which the appellant is charged. The ground of appeal is therefore without merits and is dismissed.

The appellant argued that the complainant did not produce initial treatment card to prove that she was defiled. The law is clear that original or any treatment card is not a relevant document to prove

defilement.What is required is P3 form duly filled and completed by medial officer/practitioner. In this case P3 form was filled by a medical officer and produced by PW5 Dr. Isaac Macharia. On the p3 form on page 3 section "C" which is required to be completed in alleged sexual offences it is clear that the doctor observed no injuries to labias and vagina but noted there was perforated hymen. On page 4 under No. 6 it was noted that there was a perforated hymen showing degree of penetration. The P3 form therefore confirm that there was penetration.

On evidence of PW5, Dr. Isaac Macharia produced P3 form which was prepared by Dr. Henry Njiru who was by then at Chuka District Hospital and no longer working within Meru General Hospital. He averred that he had worked with the doctor and knew his handwriting. The applicant argue that the doctor should not have produced the P3 form but the maker of the same.

Section 33 of the Evidence Act provides:-

33. Statements, written or oral, of admissible facts made by person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases......"

*Section 77 of the evidence Act also provides**:-***

> ***(1) In criminal proceedings any document purporting to b ereport under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence......"***

Having considered the above mentioned sections and the fact that the prosecution had laid basis for producing the P3 form made by a doctor who was not available and the fact that the appellant raised no objection during the trial, I find that it was in order for the trial court to have accepted the production of P3 form by PW5 Dr. Isaak Macharia.

PW 5 in his evidence went through the P3 form by Dr. Henry Njiru and which P3 form was produced as exhibit Pexh. 4. This court was referred to the P3 form by both counsel and had the opportunity of perusing the same and has considered the evidence of PW5. The evidence of PW 5 was not contradictory to the P3 form consequently find the appellants ground of appeal to the effect that PW5 was not supposed to give evidence on behalf of the marker of P3 form to be without basis and the same is dismissed.

The appellant's defence was defence of alibi. He denies committing the offence stating that he was at Nanyuki where he went as from December 2006 to work for Marget Kajuju in her farm. That he was arrest on returning back home. He claimed the offence was fabricated. He stated that probably there is a grudge between their families. DW 2 Joseph Kinoti, father to the appellant stated he does not know why his son is in court. He averred that his son went to Nanyuki with his daughter on a date he could not recall. He averred the appellant was arrested due to a grudge. DW3, sister to the appellant testifies that the appellant went to work in her shamba in December 2006 and stayed there till August 2009 when he returned home. DW 3 came later to know of the arrest of the appellant and being charged with the offence.

PW1 testified that on 13/6/2006 at 6.45 pm she was coming from Ntugi market, when appellant who was following her from behind caught up with her. Before the attack she looked back and saw that it was the appellant, Mwirigi, who was following her after hearing footsteps. PW1 knew the appellant since her nursery school days. She used to see him passing near their home while looking after sheep. The incident took place before it had become dark. The appellant held PW 1 by neck and pressed lesso on PW1's neck. PW1 fell down and the appellant lay on top of PW1. The complainant could not scream

loudly as the appellant had pressed her neck. PW1's biker and pant were torn. The appellant removed his trouser and defiled the complainant. The complainant bleeded and after the appellant was through he left her. PW1 went home and found her grandmother (PW2) who was with A M and PW 1's mother (PW3). PW1, PW2 and PW3 went and reported to the police at Subuiga station. PW 1, gave the name of her assailant as the appellant to PW2 and PW3.

The incident took place when there was sufficient natural light. PW1 recognized her assailant as the appellant who she knew and even gave his name to her grandmother PW2 and her mother PW3. PW1 had known the appellant since she was in nursery school.

The appellant was a neighbour and was well known to PW1, PW2 and PW3.

I have carefully examined the evidence of the complainant PW1, and the basis upon which she claim she saw and recognized the appellant. My observation is that the complaint gave the name of the appellant to her grandmother PW2 and her mother PW3 and a neighbour and the matter was reported to the police that same night. The appellant was known by all by name and as a neighbour.

I find the evidence of PW1, PW2, PW3 and PW5 to be consistent and un- shaken and carefully points to the identification of the assailant as the appellant.

The complainant evidence was corroborated by PW2, PW3, and PW5. The medical report confirmed that PW1's hymen was perforated showing there was penetration.

The appellant denied having committed the offence. He gave sworn defence and called two defence witnesses. The appellant's defence was of alibi. The trial magistrate considered his defence and rejected the same as the appellant and his witnesses could not state the time he left for Nanyuki. In actual fact they stated the appellant left for Nanyuki in December 2006 and was arrested in July 2009. The trial court found the prosecution case was that the appellant left on 13th June 2006 soon after the incident and could not be found till in July 2009. The court found the appellant could not explain why PW2 and PW3 had to fabricate the case against him. The court found no evidence to suggest fabrication of this case against the appellant.

I have carefully re-examined the evidence of PW1, PW2 and PW3 and have no doubt that the prosecution witnesses evidence dislodged the appellants' defence of alibi. The appellant was known to PW1, PW2 and PW3. PW1 clearly described the person who defiled her and even gave his name to PW2 and PW3. The appellant in his defence did not say anything about his whereabouts on 13th June 2006. The two defence witnesses did not either say that the appellant was at Nanyuki as of 13th June 2006. The appellant was properly recognized by PW1 and was placed at the scene of the incident. The appellant and his witness did not prove there was any grudge between PW1 and the appellant and none was disclosed at any rate. The allegations of there being grudge is therefore without basis and the same is just an after thought.

The trial court in its judgment correctly stated the incident subject of this case took place on 13th June 2006. That the Sexual Offences Act No. 3 of 2006 came into force on 21/6/2006 and that the law applicable at the time of the commission of the offence was under Section 145 (2) and Section 144 (1) of the Penal Code as Amended by Act No. 5 of 2003 which were repealed by Act No. 3 of 2006, however the trial court sentenced the appellant to life imprisonment in each of the count and ordered the sentences to run concurrently.

The trial court failed in sentencing the appellant to appreciate that having found the appellant guilty of the main count the court could not find him guilty of the alternative count. This was error in law. The court further failed to appreciate in sentence of life imprisonment., the court could only, having found the appellant guilty of the two counts as the trial court did, sentence the appellant to life imprisonment on count 1 and put sentence in count II to abeyance. The so called, count II was an alternative count which the trial court referred to as count II. This court observed that there was the main count and an alternative count. The trial court should not have proceeded on to sentence the appellant on count II having found

the appellant guilty of count I, being the main count.

I therefore find that the appellant's appeal against sentence succeeds on the grounds that the sentence on the so called count II ought not to have been given or imposed as it was an alternative count. Furthermore where an accused is sentenced to life imprisonment on more than one count, the court ought to put the other life sentences in obeyance but not to order the accused to serve them concurrently as an individual has only one life.

Section 145 (2) of the Penal Code under which the offence had been committed before it was repealed did not provided for mandatory life sentence, but stated upon conviction one could be liable to life imprisonment.

In view of the foregoing I allow the appellant's appeal against the sentence and substitute the life imprisonment with the sentence of 20 years imprisonment from the date of conviction.

I accordingly dismiss the appeal against conviction since the same has no merits. I uphold the conviction. I however, allow the appeal against sentence, by substituting life imprisonment with 20 years' imprisonment with effect from the date of conviction.

Right of appeal.

Dated at Meru this 12th day of November 2013.

J. A. Makau

JUDGE

Delivered in open court in presence of:

Mrs. Kaume for appellant – present/absent

Mr. J. Motende for state – present/absent

J. A.Makau

JUDGE